

Hastings Law Journal

Volume 17 | Issue 2

Article 15

1-1965

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Recommended Citation

John R. Ball, *Trade Libel and Its Special Damage Requirement*, 17 HASTINGS L.J. 394 (1965).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol17/iss2/15

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TRADE LIBEL AND ITS SPECIAL DAMAGE REQUIREMENT

Proof of special damages¹ in trade libel² suits has been required since the inception of the tort. Like other segments of our law, it was a product of history and a child of an analogy. In slander of title,³ the ancestor of trade libel, a plaintiff was required to allege a particular pecuniary loss in order to come within the jurisdiction of the common law courts.⁴ Such an allegation had to specify both the particular customers and the property involved in the prospective sales lost as a result of the defendant's statements.⁵ When suits later arose in the area of product disparagement, known more recently as trade libel, the courts recognized the similarity between them and the slander of title action and required that special damages be shown in a similar manner.⁶ In a recent California suit for trade libel, *Erlich v. Etner*,⁷ the court applied this restrictive special damage requirement.

Erlich v. Etner

After a thorough investigation of his meat packing activities by a state official, David Erlich, a kosher meat distributor in the Los Angeles area, was charged with a violation of the state Kosher Food Law⁸ and brought to trial. A local rabbi, Chaim Etner, bought nearly 1,000 copies of the particular issue of the *California Jewish Press* that carried the report of the trial and distributed them to many Orthodox Jews outside their place of worship. After Erlich's acquittal, Etner continued the campaign against him by distributing to many local kosher butchers and other members of the Jewish community a lengthy, self-authored document which complained of Erlich's alleged non-kosher activities.

After alleging several causes of action in his suit against Etner, Erlich chose to proceed on the theory of trade libel.⁹ He recovered a judgment, but on appeal it was reversed for failure to prove special damages sufficiently.¹⁰ Erlich's statement of a general decrease in sales, coupled with the name of one particular lost

¹ Special damages, in contrast to general damages, are not thought of as those that usually or necessarily flow from the wrongful act, but as an unusual variety of damage that is a natural and proximate result of the act. Due to this unusual character, they must be pleaded and proved in all cases. For a good discussion of the difference between general and special damages see MCCORMICK, DAMAGES § 8 (1935).

² An unprivileged attack on the quality of one's goods or services constitutes a trade libel. *Shores v. Chip Steak Co.*, 130 Cal. App. 2d 627, 279 P.2d 595 (1955).

³ A false, unprivileged statement attacking the sufficiency of the holder's title to property constitutes a slander of title. *Southcott v. Pioneer Title Co.*, 203 Cal. App. 2d 673, 21 Cal. Rptr. 917 (1962).

⁴ Slander was usually considered only a sin and therefore under the jurisdiction of the ecclesiastical courts. In order for common law courts to obtain jurisdiction over the case, pecuniary loss had to be alleged. *Matthew v. Crass*, Cro. Jac. 323, 79 Eng. Rep. 276 (K.B. 1614); PROSSER, TORTS 755 (3d ed. 1964) [hereinafter cited as PROSSER].

⁵ PROSSER 945.

⁶ *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L.R. 9 Ex. 218 (1874).

⁷ 224 Cal. App. 2d 69, 36 Cal. Rptr. 256 (1964).

⁸ CAL. PEN. CODE § 383(b).

⁹ 224 Cal. App. 2d at 72, 36 Cal. Rptr. at 258.

¹⁰ *Id.* at 75, 36 Cal. Rptr. at 260.

customer, did not satisfy the traditional requirement that both the specific sales and the customers that were lost, as well as the existence of a causal relationship between the losses and the defendant's statements, be shown.¹¹

Although, in the opinion of this writer, such a requirement is generally outmoded today, its application in this particular case was perhaps correct. The fact situation of *Erlich* is closely analogous to conditions existing when the old rule was developed. Since *Erlich* dealt only in kosher meat, it may be assumed that his customers were all members of the local Jewish community. This narrows considerably the number of people whose conduct had to be investigated in order to see whether they were influenced by *Etner's* statements and makes the precise identification of lost customers somewhat easier. The fact that *Erlich* was a wholesale merchant would also contribute to the propriety of the application of the old rule. As a wholesaler, he may be assumed to have dealt with his customers on a regular and somewhat personal basis; thus he could readily have noticed the loss of particular customers. He could have used his records of dealings with these regular customers to determine not only their identities but also the approximate date of termination of business with them.

Due to the presence of such facts, the case itself can be considered a limited application of the old special damage rule. However, the general problem of the applicability of such a rule is still with us. The purpose of this note is to consider whether such a rule is unrealistic today and to examine some possible alternatives to its automatic application.

Flaws in the Special Damage Requirement

Economic conditions have changed considerably since the days of the slander of title cases that established the requirement of showing specific lost sales. For our purposes, the two most important changes have been (1) the fact that the merchandise market has become increasingly larger and more complex, and (2) the fact that the accurate prediction of future lost sales caused by a particular statement has become more feasible.

In the early cases¹² requiring the showing of specific lost sales, no special hardship was imposed on the plaintiff merchants. Their business was conducted on a relatively small scale, and they were generally personally acquainted with the majority of their customers. The loss of specific customers would readily have been noticed, and the individual could be subpoenaed to assist the plaintiff in proving the elements of his case. But gone are the days of the craftsman who performed all of the steps in both the manufacturing and marketing of his product. Largely gone, also, are the days of the small local merchant with a fixed clientele. Such a change in conditions makes the determination of the specific sales that were lost as a result of the defendant's statements a physical and financial impossibility. Some courts have recognized this fact¹³ and have taken action consistent with it.

Just as the proof of specific lost sales is more difficult, the accurate assessment of

¹¹ *Ibid.*

¹² The rationale given in *Wilson v. Dubois*, 35 Minn. 471, 29 N.W. 68 (1886) was that if the damages were actual, plaintiff would have no trouble showing the specific sales that he had lost. If there was no such loss, the cause of action would fail.

¹³ *Maytag Co. v. Meadows Mfg. Co.*, 45 F.2d 299 (7th Cir. 1930); *Royer v. Stoodly Co.*, 192 F. Supp. 949 (W.D. Okla. 1961); *Marr v. Putnam*, 196 Ore. 1, 246 P.2d 509 (1952); *Ratcliffe v. Evans*, [1892] 2 Q.B. 524.

the overall amount of loss that the plaintiff has actually suffered has become more feasible. Financial experts and economists, possessing skills and qualifications unheard of in former centuries, can synthesize the facts of the case, including the actual statements that were made, what a reasonable man would infer from them, the extent of dissemination of the statements among the plaintiff's customers, the actual variance in plaintiff's sales, and the general business trends of both the area in which plaintiff's business operates and the industry of which it is a part, in order to reach a relatively accurate determination of the amount of actual losses suffered. If such experts are allowed to testify in other situations, their testimony should also be admissible to show that special damages, in fact, were suffered, and, if they were suffered, their extent.

Possible Alternatives

While many courts have adhered to the requirement of proof of specific lost sales in trade libel cases,¹⁴ others have recognized that a problem does exist in the area and have attempted to solve the problem in various ways. Some courts have chosen to consider words attacking the quality of a person's product or services as also attacking his business reputation.¹⁵ Such statements, say the courts, constitute libel per se.¹⁶ This was the approach taken in *Rosenberg v. J. C. Penney Co.*,¹⁷ where it was held that defendant's statements that plaintiff's goods were defective and of inferior quality implied that plaintiff was not a fair businessman. Thus, said the court, surely damaged his business reputation and therefore constituted libel per se. In *Harwood Pharmacal Co. v. National Broadcasting Co.*,¹⁸ the New York court took a similar approach, saying that a broadcast statement to the effect that sleeping pills manufactured by the plaintiff contained habit forming drugs and would make the consumer ill constituted libel per se.

Those who do not favor equating statements that attack only a product with attacks upon the person present two valid points. Due to the fact that damages are presumed in all cases of libel per se,¹⁹ the plaintiff would not have to show any pecuniary losses in order to recover. So to expose the defendant to liability would be a grave injustice. Aligning trade libel with libel per se would also further en-

¹⁴ E.g., *National Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763 (8th Cir. 1927); *Gonzalez v. Hearst Consol. Publications*, 115 F. Supp. 721 (S.D.N.Y. 1953); *Shaw Cleaners and Dyers Inc. v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932).

¹⁵ The majority rule presently is that words must, in addition to attacking plaintiff's product, impute to him either deceit, fraud, or intentional misconduct, in order to be considered libelous per se. *National Dynamics Corp. v. Petersen Publishing Co.*, 185 F. Supp. 573 (S.D.N.Y. 1960); *Tex Smith, the Harmonica Man, Inc. v. Godfrey*, 198 Misc. 1006, 102 N.Y.S.2d 251 (Sup. Ct. 1951). If the charge is only that of negligence or ignorance, the court will not usually treat the statement as being actionable per se. *Shaw Cleaners and Dyers, Inc. v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932); *Marlin Fire Arms Co. v. Shields*, 171 N.Y. 384, 64 N.E. 163 (1902).

¹⁶ A statement that is libelous on its face is considered actionable per se, and damages are presumed in all cases. CAL. CIV. CODE § 45(a).

¹⁷ 30 Cal. App. 2d 609, 86 P.2d 696 (1939).

¹⁸ 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961).

¹⁹ CAL. CIV. CODE § 45(a).

trench the former in the field of defamation. Those against such an alignment²⁰ point out that the tort deals not with injury to personal feelings or reputation, but with injury to economic interests, and that the two concepts should not be confused.

In *Erlich*, however, such a solution would have been appropriate. Where a high degree of trust must exist between the merchant and his customers, courts have readily considered statements attacking the quality of the merchant's product as actionable per se.²¹ The consumers of Erlich's meats had no means of determining the propriety of his operations but had only his good word and reputation to assure themselves that his activities were consistent with the food laws of their religion. For this reason, a shadow of distrust cast by a rabbi upon Erlich's conduct could be interpreted by the consumers to mean that his products were less than satisfactory and, more important, that he had violated their sacred and ancient food laws. The court in *Erlich* may have refused to take this position because the plaintiff, at the pre-trial conference, after having based his suit on various grounds, chose to proceed on the theory of trade libel.²² In light of this circumstance, it would have been improper for the court to have classified the statements as libel per se on its own initiative.²³

An alternative solution to the problem is the reclassification of the tort of trade libel along the lines of interference with economic relations. This has been suggested by learned writers²⁴ but has been rather slowly recognized by the courts. Such a solution has many attributes, but none more meritorious than the fact that the tort of trade libel would be emancipated from defamation, an area beset with historical pitfalls and confusion,²⁵ and relocated where many feel it correctly belongs.²⁶ Dean Prosser has remarked that the substance of the action is interference with the plaintiff's economic relations and that other elements receive entirely too much emphasis.²⁷ The court in *Royer v. Stoddy Co.*,²⁸ saying basically the same thing, held that the gravamen of the tort of trade libel was the unfair competitive activity of the defendant and that any defamation was purely incidental.

However, the reclassification of trade libel into such an area will also have its shortcomings, the most difficult of which is the inherent hesitancy of the courts to recognize such new torts. Such a hesitancy can be observed in the history of the recognition of the right of privacy and of the right to recover damages for emotional distress. Courts seem to prefer to fit new fact situations into older, more

²⁰ The association with the law of slander has been termed "unfortunate." PROSSER 939.

²¹ *Ohio and M. Ry. v. Press Publishing Co.*, 48 Fed. 206 (C.C.S.D.N.Y. 1891) (common carrier); *Harwood Pharmacal Co. v. National Broadcasting Co.*, 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961) (drug manufacturer); *Larsen v. Brooklyn Daily Eagle*, 165 App. Div. 4, 150 N.Y. Supp. 464 (1914) (ice cream manufacturer).

²² 224 Cal. App. 2d at 72, 36 Cal. Rptr. at 258 (1964).

²³ "When filed, the pre-trial conference order becomes part of the record in the case and, where inconsistent with the pleadings, controls the subsequent course of the case unless modified at or before trial to prevent manifest injustice." CAL. R. CT. 216.

²⁴ PROSSER § 122; SALMOND, TORTS § 151 (7th ed. 1928).

²⁵ "There is a great deal of the law of defamation which makes no sense." PROSSER 754.

²⁶ See *Black & Yates, Inc. v. Mahogany Ass'n*, 129 F.2d 227, 236 (3d Cir. 1941).

²⁷ PROSSER 942.

²⁸ 192 F Supp. 949 (W.D. Okla. 1961).

familiar classifications than to create new ones. Another problem is that the shifting of the tort to this new area does not, by itself, solve the special damages problem with which we are ultimately concerned. Although such a realignment gives courts the opportunity to adopt what they consider to be a just special damages rule, such as the court did in *Dale System v. Time, Inc.*,²⁹ it does not require them to do so. Thus, there is no guarantee that reclassification will solve the problem under discussion.

A third possible solution, perhaps the most conservative and yet the most direct of those suggested, is a reinterpretation of the existing special damages rule in order to allow methods of proof more lenient than those required by the earlier cases. Such an idea is by no means new. In 1892, the English court in *Ratcliffe v. Evans*³⁰ realized the impossibility of showing all of the specific sales that plaintiff had lost and allowed recovery after a showing of a general decrease in sales. Although the case itself was not followed by the American courts at the time it was decided, some later cases have been consistent with the tenor of the opinion. In *Young v. New Mexico Broadcasting Co.*,³¹ plaintiff recovered after proving that he was forced to lay off his entire crew subsequent to defendant's statement. The fact that plaintiff had received no more repair orders after defendant's remarks was held a sufficient proof of damages in *Marr v. Putnam*.³² Recognizing the impossibility of showing the particular sales that had been lost, the court in *Maytag Co. v. Meadows Mfg. Co.*³³ held that, after a consideration of all of the facts of the case, the damages were to be within the sound discretion of the trial court. However, the same court went even farther and stated that even a general decrease in sales need not be alleged³⁴ because the actual damage might be in the nature of a smaller sales increase.

Difficulty with this reinterpretation might arise in jurisdictions that have statutory definitions of special damages.³⁵ However, the federal courts, notwithstanding the fact that the Federal Rules of Civil Procedure require that special damages be set forth "specifically,"³⁶ have held it sufficient that an allegation merely notify the defendant as to the nature of the damages being requested.³⁷ It was held immate-

²⁹ 116 F. Supp. 527 (D. Conn. 1953).

³⁰ [1892] 2 Q.B. 524.

³¹ 60 N.M. 475, 292 P.2d 776 (1956).

³² 196 Ore. 1, 246 P.2d 509 (1952).

³³ 45 F.2d 299 (7th Cir. 1930).

³⁴ *Id.* at 302.

³⁵ California is such a jurisdiction. They are defined as "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other." CAL. CIV. CODE § 48a(4)(b). However, this definition is part of the retraction statute, CAL. CIV. CODE § 48a, and is included therein because the statute permits recovery only of "special damages" by a plaintiff who has been libelled in a newspaper or slandered by a radio broadcast, if a proper retraction is published or broadcast. Consequently, the definition would not necessarily be applicable in other contexts, though it is referred to in CAL. CIV. CODE § 45a, which requires a plaintiff to show "special damage" before he can recover for "defamatory language not libelous on its face."

³⁶ "When items of special damage are claimed, they shall be specifically stated." FED. R. CIV. P. 9(g).

³⁷ *Continental Nut Co. v. Robert L. Berner Co.*, 345 F.2d 395 (7th Cir. 1965).

rial that the damages were not set forth "with as much precision as might be possible or desirable."³⁸

Those who continue to adhere to the old standard seem to do so more on the basis of precedent than of reason.³⁹

Conclusions

Inclusion of the tort of trade libel within the doctrine of libel per se would do away with the harshness of the old special damages rule but must, for two basic reasons, be rejected as a solution. First, the fact that damages are presumed in all cases of libel per se⁴⁰ presents a hardship that the defendant should not have to bear. The existence of liability without the presence of actual monetary damage not only tends to stir up litigation, thus violating the main policy consideration of special damage requirements,⁴¹ but also somewhat limits freedom of competition and curtails freedom of speech. To correct one injustice by the imposition of another on the opposite party in the suit would seem to be unsound. Second, trade libel is essentially unlike libel per se. The essence of defamation is injury to one's personal reputation, while trade libel is concerned with detriment to economic interests. The present distinction between the two torts should therefore be kept clear, and attacks aimed at the goods or services of an individual should be treated as constituting libel per se only in special cases.⁴²

The shifting of the tort of trade libel into the area of interference with economic opportunity is something that would, in general, be good for the law of torts. However, such a step would not solve the problem with which we are here faced. A more liberal special damage rule would have to be adopted even after such a relocation had been accomplished. For this reason, this solution is inadequate for our purposes.

It is submitted that the most realistic and desirable solution to our problem is the reinterpretation of the special damages rule so that, within the sound discretion of the trial court, special damages could be proved by means other than the showing of the particular sales that were allegedly lost.

This method of solving the problem is direct and attacks the exact area involved, and yet it is not so radical that courts would necessarily refuse to adopt it.

By allowing the court to exercise its discretion, such a damage rule would be adjustable to fit almost any situation. If the judge feels that the case is such that, if there had been a loss of business, the plaintiff would be able to allege and prove it specifically, then he could apply the rule set forth in the early cases. If the court thought it would be reasonable to call as witnesses a cross section of plaintiff's allegedly lost customers, he could require that it be done in order to show, for example, that there was in fact a loss or that there was the requisite causal relationship between the statements and the loss. If the court realized that a showing of the specific lost customers would be impractical or impossible, it could allow the plaintiff to prove his actual damage by other means.

³⁸ *Id.* at 397.

³⁹ See authorities cited note 15 *supra*.

⁴⁰ CAL. CIV. CODE § 45a.

⁴¹ The wish is to hold those liable who utter falsehoods of considerable gravity but to deter civil action in the more trivial cases. MCCORMICK 415.

⁴² See note 15 *supra*.